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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KIMBERLY R. SANTSCHE,  
Plaintiff and Respondent,  
  
v.  
JERMAINE A. HOPKINS,  
Defendant and Appellant.

A154559, A154734  
  
(Humboldt County  
Super. Ct. No. CV 180293)

Jermaine Hopkins appeals from orders denying a special motion to strike he filed under California’s anti-SLAPP statute, Code of Civil Procedure section 425.16.<sup>1</sup> He filed his anti-SLAPP motion in response to a petition brought by Kimberly Santsche, which sought injunctive relief against civil harassment under section 527.6 based on conduct arising from his dissatisfaction with the storage facility where Santsche was employed. Because the petition rested on allegations of constitutionally protected conduct, which cannot be the basis of a restraining order under section 527.6, we reverse and direct the trial court to dismiss the petition, without prejudice to Santsche’s filing of a petition premised on unprotected activity by Hopkins.

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<sup>1</sup> SLAPP is an acronym for “strategic lawsuit against public participation.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85.) All further statutory references are to the Code of Civil Procedure.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

In October 2017, Hopkins rented a storage unit from Rainbow Self Storage in Eureka, where Kimberly Santsche was employed as the general manager. Hopkins paid the first month of rent, but he quickly fell into arrears. Santsche began the process of evicting Hopkins from the storage unit, but before a sale auction took place Hopkins's property was returned to him. Although Hopkins contested the amount he owed, he paid his account balance in early February 2018.

Hopkins then embarked upon a campaign of proclaiming his dissatisfaction with Rainbow, Santsche, and other Rainbow employees. His actions included prolific posting of online comments about Rainbow and Santsche and sending them voluminous private electronic and other correspondence. According to Santsche, Hopkins also made unwelcome telephone calls to Rainbow and Santsche, came onto Rainbow's premises after being told not to, and posted personal information about Santsche online.

Hopkins eventually filed a small claims action against Rainbow and a complaint with the State Bar against Santsche for appearing at a small claims hearing to defend Rainbow. For her part, in April 2018, Santsche filed a petition for a civil harassment restraining order (the petition), which was assigned to a court of general civil jurisdiction. The petition sought an order (1) ordering Hopkins to "stop all of the ongoing harassment and let the matter of [his] Small Claim[s] suit be heard and decided by the Small Claims Court"; (2) prohibiting Hopkins from contacting her, one of her fellow employees, and their employer; and (3) requiring Hopkins to stay 100 yards away from Santsche, the employer and other employee, and Santsche's home, workplace, and vehicle.

In support of this relief, Santsche alleged in the petition that after the filing of several small claims actions,

Hopkins became a difficult person to deal with. He would come into the office and demand answers to various questions that had nothing to do with the manner in which Rainbow conducted its business.

. . . He mailed a notice to Rainbow that he would pick up his belongings with a large rented moving van at 9:15 a.m. He knew that Rainbow would not get that notice until much later in the day. Then he complained that he had lost the cost of the moving van.

He sent 48 separate e-mails to Rainbow demanding that [it] preserve certain documents.

He entered derogatory comments about Rainbow, [its] employees and its owner in Face[ ]book Posts. With no evidence whatsoever, he publicly complained that Rainbow is committing fraud on a grand scale by arranging contributions supposedly to be paid to victims of the recent fires in the Santa Rosa area. He asserts that Rainbow employees broke into his storage unit and stole various items of his personal property.

He names certain employees and states that they are engaging in a pattern of racketeering activities and should be punished under the Racketeer Influenced and Corrupt Organizations Act.

Santsche also likened “[t]his continuous harassment” to Hopkins’s actions while he was a police officer in Austin, Texas, which included “voluminous information requests while on leave during an internal investigation,” “a pattern of filing hundreds of requests for public information,” and “fil[ing] more than 15 lawsuits and appeals.”

As part of the petition, Santsche sought a temporary restraining order (TRO), which the trial court denied. In denying the TRO, the court found there was “[i]nsufficient information re: any specific actions towards any individual re: any threat of violence; violent actions or conduct otherwise that serves [no] purpose other than to annoy or harass.” The case was consolidated with the small claims action, which was subsequently dismissed.

The following month, in advance of the hearing on Santsche’s petition, Hopkins filed an anti-SLAPP motion seeking to have the petition stricken in its entirety and to be awarded his attorney’s fees and costs. Santsche opposed the motion, and she supported it with declarations and voluminous exhibits. The motion was orally denied by the trial court at a hearing in early June 2018, and a written order followed 10 days later that did

not reveal the court’s reasoning. Hopkins appealed separately from the oral ruling and the written order, and we consolidated the two resulting appellate cases.

## II. DISCUSSION

### A. *The Governing Law.*

#### 1. Civil harassment restraining orders.

Santsche brought her petition under section 527.6, which “ ‘was enacted “to protect the individual’s right to pursue safety, happiness and privacy as guaranteed by the California Constitution.” It does so by providing expedited injunctive relief to victims of harassment.’ ” (*Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1227.) Under subdivision (a)(1) of the statute, “[a] person who has suffered harassment as defined in subdivision (b) may seek . . . an order after hearing prohibiting harassment as provided in this section.” In turn, “harassment” is defined as “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner.” (§ 527.6, subd. (b)(3).)

Upon filing a petition for a civil harassment restraining order, “the petitioner may obtain a [TRO] in accordance with Section 527,” which governs TROs in general, “except to the extent this section provides an inconsistent rule. . . . A [TRO] may be issued with or without notice, based on a declaration that, to the satisfaction of the court, shows reasonable proof of harassment of the petitioner by the respondent, and that great or irreparable harm would result to the petitioner.” (§ 527.6, subd. (d).)

#### 2. Anti-SLAPP motions.

In deciding whether to grant an anti-SLAPP motion, courts engage in a two-step, burden-shifting analysis. (*Park v. Board of Trustees of California State University*. (2017) 2 Cal.5th 1057, 1061 (*Park*).) Under the first step, the court considers whether the

party filing the motion<sup>2</sup> has made “a prima facie showing that the . . . ‘cause of action [sought to be stricken] aris[es] from’ an act by the [moving party] ‘in furtherance of [that party’s] right of petition or free speech . . . in connection with a public issue.’ ” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21, quoting § 425.16, subd. (b)(1).) To make such a showing, the moving party need not demonstrate that its actions were protected as a matter of law, but need only establish a prima facie case that the actions fell into one of the categories listed in section 425.16, subdivision (e). (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 314 (*Flatley*).) If, however, the moving party cannot make such a showing, or “ ‘if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity,’ ” the anti-SLAPP motion must be denied, and the cause of action survives. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1251; see *Flatley*, at p. 317.)

If the moving party does make such a showing, the analysis proceeds to the second step, where the burden shifts to the responding party to demonstrate “that there is a probability that [it] will prevail” on the cause of action that is the subject of the anti-SLAPP motion. (§ 425.16, subd. (b)(1).) To satisfy this burden, the responding party “need only establish that [its] claim has ‘minimal merit.’ ” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).) In deciding whether this standard is met, the “court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the [responding party] has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the [responding party’s] evidence as true, and evaluates the [moving party’s] showing only to determine if it defeats the . . . claim as a matter of law.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385 (*Baral*).) If the responding party meets its burden, the anti-

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<sup>2</sup> We will refer to the party filing the anti-SLAPP motion as the “moving party” and the party responding to it as the “responding party.” The moving party is often, but not always, a defendant. Here, Hopkins was the plaintiff in the small claims case but the defendant in the case instituted by the petition.

SLAPP motion must be denied, and the responding party can continue to litigate the cause of action. (See *Flatley, supra*, 39 Cal.4th at p. 332 & fn. 16.)

“[A]nti-SLAPP motions may be filed challenging petitions for injunctive relief brought under section 527.6, because [these petitions] constitute ‘causes of action’ under the anti-SLAPP law, and there is nothing in section 425.16 which would exempt such petitions from the broad reach of this remedial statute. However, the anti-SLAPP statute does not apply to a proceeding . . . [to] determin[e] whether [a TRO] should be issued as a prelude to a hearing on the petition for injunctive relief,” since “a request for a TRO is simply an ‘application.’ ” (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 642, 652 (*Thomas*).)

We review de novo the denial of an anti-SLAPP motion. (*Park, supra*, 2 Cal.5th at p. 1067.) “If the trial court’s decision is correct on any theory applicable to the case, we affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion.” (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573.)

*B. Hopkins’s Anti-SLAPP Motion Should Have Been Granted.*

1. Santsche’s petition arises from Hopkins’s protected activity.

Hopkins argues that he carried his burden under the first prong to show that the petition arose out of his protected activity. We agree.

As we have said, protected activity under the anti-SLAPP statute is defined as an “act . . . in furtherance of the [moving party’s] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (§ 425.16, subd. (b)(1).) In turn, the quoted phrase is defined to include: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right

of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).) “[S]ection 425.16, subdivision (b)’s reference to ‘exercise of First Amendment rights “in connection with a public issue” ’ was not ‘meant to function as a separate proof requirement,’ ” and “ ‘if a communication falls within either of the “official proceeding” clauses, the anti-SLAPP statute applies without a separate showing that a public issue or an issue of public interest is present.’ ” (*Blue v. Office of Inspector General* (2018) 23 Cal.App.5th 138, 151, italics omitted.)

The petition ties Hopkins’s allegedly harassing behavior to his filing of litigation, including his e-mails asking Rainbow to “preserve certain documents.” Such communications are protected because they were “made in connection with an issue under consideration or review by a . . . judicial body” under section 425.16, subdivision (e). In addition, Hopkins’s postings on consumer and social-media websites expressing his dissatisfaction with the services he received from Rainbow and Santsche are also protected. “[A]lthough ‘not every Web site post involves a public issue,’ [citation] consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366-1367.) Although some of the claims about Rainbow and its employees that were alleged in the petition may seem outlandish, the statements were all tied to the conducting of the storage business and not purely personal attacks. Thus, the petition’s allegations rest on protected activity, and Hopkins satisfied his burden under the first prong of the anti-SLAPP analysis.

2. Santsche’s petition lacks merit because it rests on Hopkins’s constitutionally protected activity.

We therefore turn to consider whether Santsche satisfied her burden of showing a probability of success and conclude she did not. Because the petition rests on Hopkins’s protected activity, and a civil harassment restraining order does not lie for a pattern of conduct that consists of “[c]onstitutionally protected activity” under section 527.6, subdivision (b)(1), the anti-SLAPP motion should have been granted.

To prevail on a petition for a civil harassment restraining order, a person must prove, by clear and convincing evidence, that he or she was subject to either (1) “unlawful violence,” (2) “a credible threat of violence,” or (3) “a knowing and willful course of conduct directed at [him or her] that seriously alarms, annoys, or harasses [him or her], and that serves no legitimate purpose.” (§ 527.6, subds. (b)(3), (i).) The last of these three categories, covering a course of conduct, is the only one into which Hopkins’s alleged activity potentially falls.

The term “[c]ourse of conduct” is defined as a “pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, facsimile, or e-mail. *Constitutionally protected activity is not included within the meaning of course of conduct.*” (§ 527.6, subd. (b)(1), italics added.) In other words, any protected activity under the anti-SLAPP statute, which covers acts in furtherance of a person’s constitutional rights of petition and free speech in connection with a public issue (§ 425.16, subd. (b)), is necessarily also “constitutionally protected activity” that cannot establish harassment under section 527.6 based on a course of conduct. (See *Thomas, supra*, 126 Cal.App.4th at p. 662.)<sup>3</sup>

We recognize that Santsche presented evidence in response to the anti-SLAPP motion suggesting that Hopkins also engaged in activities that are *not* protected under section 425.16 and that might sufficiently support the issuance of a civil harassment

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<sup>3</sup> *Thomas* also noted that the denial of a TRO in an action under section 527.6 “can be for reasons other than a finding the petition lacks merit, and . . . in such cases, the denial of that relief should not have preclusive effect.” (*Thomas, supra*, 126 Cal.App.4th at p. 664.) Here, it appears that the trial court denied Santsche’s request for a TRO based at least in part on the insufficiency of the petition’s allegations. But we need not resolve whether the ruling should be given preclusive effect, because Santsche cannot establish that her claim has minimal merit for separate reasons.

restraining order. Santsche attested that Hopkins “continued to enter Rainbow’s Eureka office” after he was told “he was no longer a customer [and] was not welcome,” would “refuse to leave,” and acted “as though he was video-recording [their] interactions” with his phone. After her attorney contacted Hopkins and told him the police would be called if he continued to trespass on Rainbow’s premises, he continued to assert “a supposed right to enter upon the property to personally serve subpoenas himself.”

Santsche also declared that Hopkins “relentlessly” submitted postings on social media sites about Rainbow, her, and her employer and fellow employee. She also reported that Hopkins sent “literally thousands of pages of correspondence” and that she was required to expend “hundreds of hours of work time . . . dealing with” this correspondence and his telephone calls. And she attested that she became particularly alarmed when she learned that Hopkins created a website that included her personal address. She “became afraid for the personal safety not only of [herself], but of [her] whole family, and not only out of [her] primary fear of what Mr. Hopkins might be capable of, but also that some other former customer might see his site and harass, or worse, [her] family members or [her].”

Hopkins was not engaged in constitutionally protected activity when he sent copious correspondence and e-mail to Rainbow and Santsche, or frequently called them on the telephone, when he knew these contacts were unwelcome. (See *Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1409 [scarce constitutional concerns apply to speech “between purely private parties, about purely private parties, on matters of purely private interest”].) And he was not engaged in constitutionally protected activity when he went onto Rainbow’s private premises and asserted a continued right to do so after being told to stay away. (See *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, 568 [no general First Amendment right to trespass on private property].) Finally, he was not engaged in constitutionally protected activity when he posted online Santsche’s home address. Antagonistic acts, deliberate infliction of emotional distress, and intrusion and trespass onto someone’s property are not forms of speech that are constitutionally protected. (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA*,

*Inc.* (2006) 143 Cal.App.4th 1284, 1296.) Thus, the evidence Santsche submitted, if accepted, suggests she has been subjected to a knowing and willful course of conduct directed at her that seriously alarmed, annoyed, or harassed her, and that served no legitimate purpose, within the meaning of section 527.6, subdivision (b)(3).

But Santsche did not mention any of these activities in her petition. A motion to strike is directed at a *pleading*, whether in whole or in part. (*1550 Laurel Owner's Assn., Inc. v. Appellate Division of Superior Court* (2018) 28 Cal.App.5th 1146, 1156-1157.) Although it is true that *Baral* recognized that claims subject to an anti-SLAPP motion can be “mixed causes of action, i.e., causes of action that allege both protected and unprotected activity” (*1550 Laurel*, at p. 1156), a responding party cannot transform a claim based on protected activity into a mixed cause of action by bringing forth, at the second prong, evidence of unprotected activity that would support the claim.

That said, the purpose of an injunction under section 527.6 is not to punish the respondent for past acts of harassment, but to provide quick relief and prevent future harassment. (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 403.) People petitioning for such injunctions are entitled to be heard when they complain of a course of conduct of harassing behavior that includes activity that is not constitutionally protected. Thus, while we conclude that the anti-SLAPP motion should have been granted, we do not rule out the possibility that Santsche may be entitled to a civil harassment restraining order against Hopkins based on other activity that her instant petition did not allege.

*C. Hopkins's Request for Attorney Fees and Costs.*

Finally, Hopkins argues that he is entitled to attorney fees and costs, incurred both below and in this court. It is true that “a prevailing [moving party] on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” (§ 425.16, subd. (c)(1).) We will award Hopkins his costs on appeal, to which he is separately entitled under California Rules of Court, rule 8.278(a), but as a party acting in *propria persona* he is not entitled to attorney fees under the anti-SLAPP statute. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524-525.) As to the costs he may have incurred below, he may seek them in the trial court in the first instance.

### III. DISPOSITION

The orders denying Hopkins's anti-SLAPP motion are reversed, and the matter is remanded with directions to grant the motion and dismiss Santsche's petition for a civil harassment restraining order, without prejudice to Santsche's filing of a new petition that rests on activity by Hopkins that is not constitutionally protected. Hopkins is awarded his costs on appeal.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Banke, J.

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